BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2018-318-E

IN RE: Application of Duke Energy Progress, LLC for Adjustments in Electric Rate Schedules and Tariffs and Request for an Accounting Order	))))	**ORS ANSWER TO DUKE ENERGY PROGRESS, LLC'S PETITION FOR REHEARING OR RECONSIDERATION OF ORDER NO. 2019-341**

The South Carolina Office of Regulatory Staff ("ORS") respectfully submits this Answer pursuant to S.C. Code Ann. Regs. 103-826 (2012) to the Duke Energy Progress, LLC ("DEP" or the "Company") Petition for Rehearing or Reconsideration ("Petition") of Public Service Commission of South Carolina ("Commission") Order No. 2019-341 issued on May 21, 2019.[1] For the reasons set forth below ORS respectfully requests that the Commission deny the Petition for Reconsideration filed by DEP.

ORS's Answer responds to the Company's arguments in its Petition regarding 1) coal ash remediation and disposal costs; 2) treatment of deferrals; 3) return on equity; 4) coal ash litigation expenses; and 5) the CertainTEED Gypsum, Inc. Litigation.

1. Coal Ash Remediation and Disposal Costs

The Commission's decision to disallow recovery of $333,480,308 in coal ash remediation and disposal costs ("Coal Ash Costs") is supported by the substantial evidence on the whole record

[1] This Answer responds only to DEP's Petition and does not address issues raised by other parties.

and appropriate. The unpermitted discharge by Duke Energy of approximately 27 million gallons of coal ash wastewater and an estimated 39,000 tons of coal ash into the Dan River played a deciding role in the development of North Carolina's Coal Ash Management Act ("CAMA") in its present form, not only accelerating the timing of action required, but also limiting the options to remediate and close coal combustion residuals impoundments more than would eventually occur under the Federal Coal Combustion Residuals ("CCR") Rule. (R. p. 1115-15, ll. 13-23). Information exposed in the Duke Energy federal plea deal revealed that on two separate occasions, Duke Energy engineers at the Dan River plant requested an immaterial amount of budget funding to pay for video equipment to scope the pipe that later failed. (R. p. 1004-34, ll. 11-14). Duke Energy engineers were denied their request. ((R. p. 1004-34, ll. 14-15). In response to the Dan River spill, the North Carolina Legislature passed CAMA that required the closure of existing coal ash ponds as well as conversion from wet ash to dry ash handling. ((R. p. 1004-34, ll. 17-20). Duke Energy Carolinas, LLC ("DEC") and DEP were criminally and civilly negligent in their operations and maintenance of the impoundments for years prior to the enactment of CAMA, confirming that DEC and DEP failed to responsibly address and correct these issues adequately – and consequently in a much less costly – manner than it is currently being required to do. (R. p. 1115-16, ll. 16-22). Duke Energy management made specific decisions that resulted in the coal ash spill in North Carolina, that in turn, led to the creation of CAMA. ((R. p. 1004-38, ll. 32-33).

North Carolina's CAMA is significantly more restrictive and stringent than the federal CCR Rule (R. p. 1115-21, ll. 21-22). According to Duke Energy's director of environmental policy, Mark McEntire, "'[t]he NC law came before the CCR [rule]," he said. "We find that NC CAMA that is specific to NC is generally driving decision making on a management perspective on coal ash...From a comparison perspective the CAMA is generally a good bit more stringent.'"

R. p. 1008-4, ll. 14-18). Additionally, witness Wittliff testified that North Carolina's CAMA rules resulted in additional expenses being incurred at DEP's Asheville and Sutton plants, due to an accelerated closure schedule than the federal CCR rule would have otherwise required. (R. p. 1115-23, ll. 4-120). Regarding costs incurred at the DEP plant H.F. Lee, witness Wittliff, testified that DEP's beneficiation project at H.F. Lee falls under the "CAMA-only" category, and the ratepayers of South Carolina should not have to reimburse the Company for expenses related to North Carolina's CAMA-only beneficiation requirement. (R. p. 1115-36, ll. 1-4). According to witness Wittliff, the federal CCR rule does not require beneficiation and as a result, no savings could accrue to customers as a result of beneficiation performed pursuant to North Carolina's CAMA. (R. p. 1212, ll. 5-10). Regarding costs incurred at the DEP plant Sutton, witness Wittliff testified that the federal CCR rule does not require the closure of Sutton and therefore he reasonably concluded that the closure of Sutton was directed by North Carolina's CAMA and the North Carolina court orders mentioned by DEP witness Kerin. (R. p. 1115-37, ll. 16-21). Regarding costs incurred at the DEP plant Asheville, witness Wittliff testified that the extent of compliance measures undertaken by DEP to comply with North Carolina's CAMA and other North Carolina laws, resulted in much greater costs than what the federal CCR rules would have required (R. p. 1115-40, ll. 7-19). Regarding costs incurred at the DEP plant Weatherspoon, witness Wittliff testified that DEP has represented its Weatherspoon efforts as beneficiation, which is not required under the CCR rule. (R. p. 1115-42, ll. 21-23).

DEP directly assigns certain costs to its North Carolina and South Carolina jurisdictions and often these costs are derived from laws and regulations specific to that jurisdiction. (R. p. 1099-6, ll. 10-16). Additionally, the Company has already excluded certain costs from this proceeding that were incurred due to North Carolina law including: recovery of certain costs that

are associated with the provision of drinking water to North Carolina residents, the costs to comply with the North Carolina Clean Smokestacks Act, North Carolina Renewable Portfolio Standards, and the North Carolina Competitive Energy Solutions for NC (HB.589) laws. (R. p. 1101-9, ll. 1-5). Finally, the South Carolina General Assembly has not passed legislation that is similar to North Carolina's CAMA. (R. p. 1115-21, l. 8-9).

The Commission's Decision is Supported by South Carolina and Federal Law

"The party challenging a PSC order must establish that (1) the PSC decision is not supported by substantial evidence and (2) the decision is clearly erroneous in light of the substantial evidence in the record." Kiawah Property Owners Group v. Public Service Com'n of South Carolina, 359 S.C. 105, 109, 597 S.E.2d 105, 109 (2004). "Because the Commission's findings are presumptively correct, the party challenging the Commission's order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole." South Carolina Energy Users Committee v. South Carolina Public Service Com'n, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010). Although the burden of proof in showing the reasonableness of a utility's costs that underlie its request to adjust rates ultimately rests with the utility, the South Carolina Supreme Court has concluded that the utility is entitled to a presumption that its expenses are reasonable and were incurred in good faith. Hamm v. S.C. Pub. Serv. Comm'n, 422 S.E.2d 110, 309 S.C. 282 (1992) (internal citations omitted). However, that presumption is not dispositive, the burden remains on the utility to demonstrate the reasonableness of its costs, and the presumption in a utility's favor clearly does not foreclose scrutiny and a challenge. Utilities Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff 392 S.C. 96, 109, 708 S.E.2d 755, 762 (2011). "The ultimate burden of showing every reasonable effort to minimize [] costs remain on

the utility." See Hamm v. South Carolina Public Service Com'n, 309 S.C. 282 286, 422 S.E.2d 110 112,113 (1992). Additionally, "[i]n rate cases, [the] Public Service Commission is recognized as the 'expert' designated by the legislature to make policy determinations regarding utility rates." Hamm v. South Carolina Public Service Com'n, 294 S.C. 320, 322, 364 S.E.2d 455, 456 (1988) citing Patton v. South Carolina Public Service Com'n, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984).

In this instance it's clear that other parties presented evidence that overcame the initial presumption of reasonableness to which the Company was entitled and that it failed to make every reasonable effort to minimize costs. Multiple witnesses testified that Duke's actions led to the release of coal ash into the Dan River and the subsequent enactment of CAMA. Parties presented evidence that CAMA was enacted by the North Carolina General Assembly as a direct result of the Company's action and that costs increased as a result of CAMA. Additionally, evidence was presented to the Commission that it would be unreasonable for South Carolina customers to bear these increased costs, which result from a North Carolina law and Duke's discharge of approximately 27 million gallons of coal ash wastewater and an estimated 39,000 tons of coal ash into the Dan River. According to witness Wittliff, ORS has taken the position that North Carolina laws, over which DEP's South Carolina customers have no meaningful input, should not place an additional economic burden on the ratepayers of South Carolina. (R. p. 1115-31, ll. 2-6).

Any presumption to which the Company was entitled is not dispositive. The Company's assertion that the Commission lacked a legal basis for denying its recovery of the Coal Ash Disposal costs is incorrect. The record is replete with evidence which supports the Commission's decision that recovery of the North Carolina Coal Ash Disposal costs from South Carolina ratepayers would be unreasonable. The Commission properly relied upon substantial evidence on

the whole record, which overcame the initial presumption of reasonableness, in determining it would be unreasonable for South Carolina customers to bear these Coal Ash Disposal costs.

The Company alleges that the Commission's Order results in an unconstitutional taking; however, no unconstitutional taking occurred because no property right existed in the first place. The Company's filing presumes that the Company had the *right* to recover its sought North Carolina Coal Ash Disposal costs, which of course, as evidenced by the Company's application in which it sought recovery, it did not. The Fifth Amendment to the United States Constitution provides that "private property shall not be taken for public use, without just compensation." U.S. Const. amend. V.[2] However these protections only arise where a property right exists. Because the Company had no right to recovery of its North Carolina Coal Ash Disposal costs in South Carolina, no unconstitutional taking occurred.

The Company has also asserted that the Commission's Order violates the Commerce Clause of the United States Constitution. ORS objects to this argument being only now being presented to the Commission. The Company had several opportunities to raise this issue: during the hearing, in its Proposed Order and in its Brief but failed to do so. In discussing Petitions for reconsideration or Rehearing filed before it, the South Carolina Supreme Court stated, "[t]he purposes of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this court a second time." Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234, 238 (1933). While the above case relates specifically to a Petition for Rehearing filed at the South Carolina Supreme Court, the guiding principal remains. *See* Kiawah

[2] The Fifth Amendment is implicit in the due process clause of the Fourteenth Amendment to the United States Constitution and applicable to the states. Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

Prop. Owners Grp. V. Pub. Serv. Comm'n of S.C., 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (holding that an issue the utility "first broached . . . in its petition for rehearing to the PSC" was "not preserved."); *see also* Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct.App.1995) (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment); McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996) (a party may not raise an issue for the first time in a motion for a new trial). Additionally, the Commission has previously determined that a party may not raise an issue in a Petition for Rehearing that could have been presented prior to judgment.

However, notwithstanding and while preserving the above objection, the Commission's Order does not engage in economic discrimination or burden the flow of interstate commerce. South Carolina's Commission does not dictate actions of the Company, the North Carolina Legislature, or other Commissions and has not engaged in economic discrimination or burden the flow of interstate commerce.

The Company has also asserted that the Commission's Order violates the doctrine of equitable estoppel. ORS objects to this argument being only now raised before the Commission. The Company had repeated opportunities to raise this issue during the hearing, in its Proposed Order and in its Brief but failed to do so.

However, notwithstanding and while preserving the above objection, there is ample evidence in the record that the North Carolina Coal Ash Costs at issue were unreasonable and should not be forced upon the Company's South Carolina ratepayers and the Commission did not violate the doctrine of equitable estoppel. Generally, "'estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy.'" Quail Hill, LLC v. County of Richland, 387 S.C. 223, 236, 692 S.E.2d

499, 506 (2010) (quoting Greenville County v. Kenwood Enters., Inc., 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003)). Estoppel runs against the government only in certain limited situations. In these situations, the party claiming estoppel against the government "must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." Id. at 236-37, 692 S.E.2d at 506. "In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct." 28 Am. Jur. 2d Estoppel and Waiver § 27 (2011). "The essence of equitable estoppel is that the party entitled to invoke the principle was misled to his injury." S.C. Pub. Serv. Auth. v. Ocean Forest, Inc., 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). "The party asserting estoppel bears the burden of establishing all its elements." Morgan v. S.C. Budget & Control Bd., 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (quoting Estes v. Roper Temp. Servs., 304 S.C. 120, 122,403 S.E.2d 157, 158 (Ct. App. 1991)). "Absent even one element, estoppel will not lie against a government entity." Id. at 320, 659 S.E.2d at 267.

In this instance, the Company has failed to meet its burden of establishing all elements of its equitable estoppel claim and as a result, the claim fails. However, assuming *arguendo* that the Company had attempted to establish all elements it nonetheless would have failed. The Company itself removed certain costs related to Coal Ash Disposal costs, as well as costs incurred due to other North Carolina laws. (*See* R. p. 1101-9, ll. 1-5). Therefore, it's clear that the Company had no justifiable reliance that this Commission would allow recovery of these Coal Ash Disposal Costs. Additionally,

the Commission has consistently removed from recovery costs incurred due to other states' laws that are over and above what South Carolina law requires.[3] As a result, there has been no prejudicial change in position. For the foregoing reasons, it is clear the Company's claim that the Commission's Order violates equitable estoppel fails.

The Company also incorrectly claims that the Commission made factual errors. According to the South Carolina Supreme Court, "[t]he Commission sits as the trier of facts, akin to a jury of experts." Hamm v. South Carolina Public Service Com'n, 309 S.C. 282, 287, 422 S.E.2d 110, 113 (1992). While parties may present varying viewpoints, it is the Commission that tries the facts and bases its conclusion thereon. The Company lists errors that it alleges were made by ORS witness Witliff; however, it fails to connect many of these errors to the record or the Commission's analysis contained in the Order. In fact, many of the allegations cannot be substantiated by the record and are being raised for the first time in the Company's Petition for Reconsideration. As a result, ORS objects to their consideration. However, notwithstanding and while preserving the above objection, the Commission is the trier of fact, and it properly weighed all evidence put before it by the parties and made a well-reasoned conclusion.[4]

Finally, the Company alleges that the Commission's Order fails to make findings of fact or conclusions of law. This claim is without merit, as evidenced by the findings of fact and conclusions of law on pages 104-105 of the Order, which are supported by the facts and analysis

[3] *See* Commission Order No. 2016-871, in which, without objection by the Company, costs were excluded from recovery because South Carolina does not allow purchase acquisition adjustments, which were granted by the North Carolina Public Utilities Commission pursuant to North Carolina Senate Bill 305, S.L. 2015-3, § 1, eff. April 2, 2015.

[4] Assuming the Company had previously raised these allegations, raising them here serves as nothing more than a recitation of evidence that conflicts with evidence presented by ORS witness Witliff.

presented on pages 39-52 of the Order. When making specific, express findings of fact, no particular format is required. Id. citing Airco, Inc. v. Hollington, 269 S.C. 152, 236 S.E.2d 804 (1977). While it is true, "a recital of a recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues," that is not what the Commission has done here. Able Communications, Inc. v. South Carolina Pub. Serv. Comm'n, 290 S.C. at 411, 351 S.E.2d at 152.

The Commission clearly laid out and considered the evidence presented by the parties and, beginning on page 48 of its Order, detailed its well-reasoned analysis in reaching the conclusion that it would be unreasonable for the Company's South Carolina customers to bear the burden of these North Carolina Coal Ash Expenses. These costs directly stem from Duke's negligence, would impose great costs upon South Carolina customers as a result of a law they had no voice in, and allowing one jurisdiction's laws to impose these costs on another's ratepayers would be departure from past Commission rulings and practice. As a result, the Commission's Order is not arbitrary or capricious, contains all required analysis and rests upon the substantial evidence in the whole record.

2. Treatment of Deferrals

The Commission's decision results in just and reasonable rates for both DEP and its South Carolina customers and does not violate the rights of the Company. South Carolina Code Ann. § 58-27-810 provides, "[e]very rate demanded or received by any electrical utility . . . shall be just and reasonable." Furthermore, "the fixing of 'just and reasonable' rates involves the balancing of the investor and the consumer interests...." Southern Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n, 270 S.C. 590, 596-97 (1978) ("Southern Bell") (quoting Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602-03 (1944) ("Hope"). The Supreme Court has held, that (1) a regulated

public utility is entitled to rates that allow it the opportunity to earn a return on its invested capital that is equal to that being made at the same time and in the same general part of the country of other investments in business undertakings with similar risks and uncertainties, (2) the return should be such as to assure confidence in the financial soundness of the utility and adequate, under efficient and economic management, to maintain and support its credit and enable it to raise money necessary for proper discharge of its duties, (3) the utility has no right to the kinds of profits that may be realized in highly profitable enterprises. Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679, 692-93 (1923); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602-03 (1944).

"The Commission sits as the trier of facts, akin to a jury of experts," Hamm v. SC PSC, 309 S.C. 282, 287, 422 S.E.2d 110, 113 (1992) (citing SC Tel. & Tel. Co. v. SC PSC, 270 S.C. 590, at 597, 244 S.E.2d 278, at 282 (1978)). Basing a decision on one party's testimony instead of another's is not an arbitrary action. See Docket 2001-209-C, Order No. 2004-257. The Commission "undeniably ha[s] the ability to choose between two competing positions as expressed in the record testimony." Id. "The Commission has wide latitude to determine its methodology in rate-setting and there is no abuse of discretion where substantial evidence supports the finding of a just and reasonable rate." Porter v. South Carolina Public Service Comm'n, 328 S.C. 222, 233, 493 S.E.2d 92, 98 (1997) citing Heater of Seabrook, Inc. v. Pub. Serv. Comm'n, 324 S.C. 56, 478 S.E.2d 826 (1996).

The substantial evidence on the whole record supports the Commission's decision regarding deferrals for adjustment numbers 17, 18, 19, 30, and 35 (the "Adjustments"), and results in just and reasonable rates that balance both the investor and consumer interests. As discussed in the Order, treatment of deferrals is ultimately a matter of the Commission's discretion. The Commission has

a duty to balance the needs of the public and the utility such that the public is served without the utility being disserved. Fed. Power Comm'n v. Hope Natural Gas, Co., 320 U.S. 591, 603 (1944) ("the fixing of 'just and reasonable' rates involve a balancing of the investor and the consumer interests"). Consistent with fundamental regulatory accounting principles, Operations and Management ("O&M") expenses are not entitled to a weighted average cost of capital ("WACC") return and are not appropriate to include in rate base. (Tr. pp. 1245-4, -5; pp. 1247-4, -5.) The Commission's Order ensures that the Company can recover carrying costs associated with capital-related investments and strikes a balance between the interests of the Company and customers. Additionally, it adheres to a clear and well-established regulatory principle in that "rate base and operating expenses are treated differently, with only rate base items being eligible for a return." (Tr. 803-19.) This principle is backed by objective criteria, which provides all parties with clear expectations. The existence of these objective criteria also promotes transparency and the ability to understand how this Commission sets the rates that a utility may charge.

While DEP has the right to a level of rates that allow it the opportunity to earn a sufficient return on its invested capital, per Hope and Bluefield, DEP's proposed treatment for "returns on" deferrals, if strictly applied, would tend to encourage the Company to seek more accounting deferrals for O&M costs that are non-extraordinary. (*See* Tr. p. 1247-8.) Additionally, Company witnesses offered no South Carolina statute or accounting standard to support the Company's inclusion of cost recovery of the weighted average cost of capital in the recovery of deferral balances. (R. p. 1247-4, ll. 6-9). The ultimate impact of the Company's proposal would be to greatly inflate costs in future years, which will be passed on to customers through rates. (*See* Tr. p. 1247-8.) Allowing a "return on" and rate base treatment of operating expenses also overlooks the fact that operating expenses are typically paid for with operating revenues which are collected

through rates. (Tr. pp. 1247-4, -5.) The Company collected $562,000,000 in operating revenues from South Carolina customers during 2017 through rates designed to allow recovery of the Company's operating costs as well as provide a reasonable return on shareholders' capital investments. (Tr. p. 1245-5; Tr. pp. 1247-4, -5.)

In its Petition for Reconsideration, the Company asserts that ORS's logic is misplaced and inconsistent by comparison with the accounting treatment for the balances associated with Excess Deferred Income Tax ("EDIT") and the Tax Cuts and Jobs Act. The Company's assertion fails because those accumulated deferred income tax balances have prescribed accounting treatment, which is documented in regulatory and accounting publications and guidelines. (R. p. 1247-11, ll. 1-7).

Each deferral should be examined to determine if the deferred costs are appropriate to be included in rate base. (R. p. 1245, ll. 19-20).[5] The magnitude of the deferrals now sought by the Company, coupled with the implications of recovery of a return on those deferrals and the careful examination given by the Commission of the substantial evidence in the whole record allows the Commission to now hold that recovery of a return on O&M expenses included in those deferrals would not be just and reasonable. Furthermore, the Commission has allowed the Company to recover a return of the deferred costs as well as a return on the capital related deferred costs. "The declaration of an existing practice may not be substituted for an evaluation of the evidence." Butler Township Water Co. v. Pennsylvania Pub. Util. Comm'n, 81 Pa. Commw. 40, 473 A.2d 219 (1984). The Commission would commit error if it relied on a previously adopted policy as the sole basis for the Commission's action.

[5] *See Also*, "cost recovery for deferred balances is determined by state Commissions on a case by case basis." (R. p. 1247-10, ll. 20-21).

The Company is correct that the Commission previously approved the Company's requests for accounting orders to defer certain expenses; however, the Commission orders provide no guarantee to the Company for a return on those expenses. In fact, the orders include the following language, "[g]ranting the deferrals will not preclude this Commission or any party from addressing the reasonableness of costs deferred in regulatory asset and liability accounts in the next general rate proceeding" *See* Order No. 2014-138, p. 6; "[t]his Order does not preclude the Commission or any party from addressing the reasonableness of the expenses in a subsequent general rate case or other proceeding" *See* Order No. 2016-36, p. 3; "[t]his ruling in no way limits the ability to challenge the reasonableness of these expenditures in a subsequent general rate case or other proceeding" *See* Order No. 2016-490, p. 2; or "[t]his matter will not preclude the ORS, the Commission, or any other party from addressing the reasonableness of these costs, any return sought, and including any carrying costs in a subsequent general rate case or other proceeding." *See* Order No. 2018-751. In this situation, the Commission properly relied upon the substantial evidence in the whole record in making its determination. As a result, the Commission's Order commits no error.

The Commission's conclusion that DEP be entitled to recover a "return of" all deferred costs (with the exception of coal ash costs) and that DEP only be allowed a "return on" its capital-related deferred costs achieves an equitable sharing of deferred costs between customers and shareholders that binding case law requires and is supported by the substantial evidence on the whole record.

3. <u>Return on Equity</u>

The South Carolina Court has also held that the Commission's ratemaking decisions are entitled to deference and will be affirmed if supported by substantial evidence. <u>S.C. Energy Users</u>

Comm. v. S.C. Public Service Comm'n, *388 S.C. 486, 490, 697 S.E.2d 587, 589 (2010).* "Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action." Porter v. S.C. Public Service Comm'n, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998). The Company is, by law, entitled to a reasonable return on its allowable costs. See, Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281 (1944) and Bluefield Water Works and Improvement Co. v. Public Service Comm'n, 262 U.S. 679, 43 S.Ct. 675 (1923). While a public utility is entitled to an opportunity to earn a fair return, it has no entitlement or constitutional right to earn profits comparable with highly profitable enterprises or speculative ventures. Bluefield v. Pub. Serv. Comm'n, 262 U.S. 679, 690. The South Carolina Supreme Court has held that

> [t]he PSC should establish rates that will produce revenues for the utility 'reasonably sufficient to assure the confidence in the financial soundness of the utility...and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.'

Kiawah Property Owners Group v. PSC, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004) citing Bluefield Waterworks, 262 U.S. 679, 693. Finally, "regulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors interests provide only one of the variables in the constitutional calculus of reasonableness." Permian Basin Area Rate Cases, 390 U.S. 747, 769 (1968) (citing Covington & Lexington Turnpike Co. v. Sandford, 164 U.S. 578, 596 (1896)).

In fulfilling its obligation to balance the interests of the ratepayers with those of the utility, the Commission properly relied upon substantial evidence in the record and determined that the most appropriate ROE in this case is 9.5%, which is above the mid-point of the range

recommended by witness Parcell and within nine basis points of the national average authorized ROE for all electric utilities.

The Commission approved a return on equity ("ROE") for DEP of 9.5 %, which is supported by substantial evidence in the record. ORS witness David Parcell recommended that the Commission approve a 9.3% ROE, which was the midpoint of his range of 9.1% to 9.5%. The Commission's decision to apply a ROE of 9.5% is neither arbitrary or capricious and is supported by substantial evidence in the record as further detailed below. The Commission Order is further supported by the rule in South Carolina that "[t]he Commission has wide latitude to determine its methodology in rate-setting and there is no abuse of discretion where substantial evidence supports the finding of a just and reasonable rate." Porter v. South Carolina PSC, 328 S.C. 222, 233, 493 S.E.2d 92, 98 (1997) *citing* Heater of Seabrook, Inc. v. Pub. Serv. Comm'n, 324 S.C. 56, 478 S.E.2d 826 (1996).

DEP argues in its Petition for Reconsideration that the Commission should reconsider, and increase, the approved ROE because 9.5% is below the average awarded to DEP's peers in the Southeast. DEP provides no evidence or citation to support its claim that this position is proven by "undisputed evidence" in the record. In fact, 9.5% is much closer to the national average than DEP's requested 10.5% ROE. According to data from SNL Financial, a financial news and reporting company, the average of the 111 reported electric utility rate case ROEs authorized by commissions to investor-owned utilities in 2016, 2017, 2018, and so far in 2019, is 9.61 percent. (Direct, p. 10, ll. 14-17). Further, witness Chriss testified that in the group reported by SNL Financial, the national average ROE for vertically integrated utilities authorized by state regulatory commissions from 2016 to date is 9.76 percent and overall, the average annual authorized ROE has been trending downward. (Direct, p. 11, ll. 5-7). This evidence of current allowed ROE's, the

downward trend in national averages, and testimony regarding DEP's relatively low risk, all evidence the mistakenness of DEP's claim that a 9.5% ROE is arbitrary and capricious. In its in-depth discussion of an appropriate ROE, the Commission thus properly discounted Mr. Hevert's recommended 10.75% as being far out of line with what is being awarded around the country.

DEP also argues that the Commission erred in awarding a higher ROE to South Carolina Electric & Gas ("SCE&G") in Docket 2017-370-E, in which Mr. Hevert also testified. "The declaration of an existing practice may not be substituted for an evaluation of the evidence. A previously adopted policy may not furnish the sole basis for the Commission's action." Hamm v. South Carolina Public Service Com'n, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (1992). The Commission's Orders must be "tailored to the factual circumstances of its case." Heater of Seabrook v. PSC, 332 S.C. 20, 25, 503 S.E.2d 742 (1998). Further, "State law requires the PSC's 'determination of a fair rate of return' must be documented fully in its findings of fact and based exclusively on reliable, probative, and substantial evidence on the whole record." Id., 332 S.C. at 28, 503 S.E.2d at 743.

The Company's argument ignores that the other witnesses and evidence in this case were vastly different from those presented in the SCE&G case. In the present case, ORS presented a different witness, who used a different analysis to reach a different, though similar, recommendation. Mr. Parcell's position in the current case is also additionally supported by the testimony of Walmart witness Chriss. A ruling as to the weight of evidence in the SCE&G case thus has no weight in the present case. DEP's argument that an order issued by the Commission in a vastly different case based on different testimony and evidence is somehow precedent for the determination of an appropriate ROE in this case is ill-founded. The Commission's finding of an appropriate ROE in this case is based on the evidence in the record and, despite the Company's

protestations, it is not necessary that this ruling be reconciled with the Order in the SCE&G docket, or any other prior Order of this Commission. The Commission has wide latitude in determining appropriate methodologies to set rates and the Order here is based on the substantial evidence in the record. It is not error for the Commission to fail to adopt ORS's recommendations.

Three (3) parties' witnesses pre-filed testimony that specifically addressed the issue of ROE. Robert Hevert testified on behalf of DEP, David Parcell for ORS, and Steven Chriss on behalf of Walmart.

Mr. Hevert recommended a ROE for DEP of 10.75% within a range of 10.25% to 11.25%. In the Company's Application, DEP requested that the Commission approve a ROE of 10.5%. See, Application of Duke Energy Progress, LLC, Para. 24 (Nov. 8, 2018). This recommended range is clearly extraordinarily high and exceeds the afore-cited averages by approximately 100 basis points. The differential between the averages and Mr. Hevert's recommended ROE clearly supports the Commission giving greater weight to the testimonies of witnesses Parcell and Chriss.

Witness Parcell testified that DEP's ratings were generally higher than most electric utilities in the United States and that its ratings are indicative of relatively lower risk. (R. p. 801-18, ll. 6-10). DEP witness Sullivan testified that rating agencies believe that DEP operates in a constructive regulatory environment that supports long-term credit quality and view the Company's position within the Duke Energy corporate family as credit supportive. (Direct, p. 10, ll. 6-9). DEP's witness Hevert acknowledged in testimony that he has seen no instances where a company has sought an increase in its ROE as DEP here and was granted its request in the last three to five years. (R. p. 812, ll. 19-25, p. 813, ll. 1-2). In support of its reliance on his recommendation, the Commission provided in its Order that ORS witness Parcell has provided testimony as a ROE and Cost of Capital expert witness on several occasions before this

Commission since the early 1980s (R. p. 801-2, ll. 4-6) and has testified in over 570 utility proceedings in approximately 50 regulatory agencies across the United States and Canada. (R. p. 801-1, ll. 21-22, p. 801-2, l. 1). The record thus establishes that Mr. Parcell has extensive experience in calculating ROE and Cost of Capital recommendations and that the Commission was justified in placing its reliance on his expert opinion in determining an appropriate ROE. The Commission additionally fully detailed in the Order the methodologies and procedures used by Mr. Parcell in reaching his recommendation.

The substantial evidence in the record supports the Commission's decision relying on Mr. Parcell. The Order recounts that the Direct and Surrebuttal Testimonies of Mr. Parcell employed three (3) recognized methodologies to estimate DEP's Cost of Equity: the DCF, CAPM, and Comparable Earnings (CE) models. He applied each of these methodologies to two (2) proxy groups – his own and the one developed by DEP witness Hevert – to establish a range of 9.1% to 9.5%, with a 9.3% mid-point. (R. p. 801-3, ll. 14-16; p. 801-4, ll. 3-5). Mr. Parcell established this range based on the results of his DCF (range of 9.0% to 9.2% with a 9.1% midpoint) and CE (range of 9.0% to 10.0% with a 9.5% midpoint) models. (R. p. 801-4, l. 1). As a result of these analyses, Mr. Parcell recommended a Cost of Capital in the range of 6.73 to 6.94 %, with a mid-point of 6.84 %. (R. p. 801-4, ll. 8-9). In reaching his recommendation of a 9.3% ROE, Mr. Parcell in large part relied on the DCF model, which is an analysis of current market conditions. The DCF model relies on current stock prices in the marketplace and has traditionally been regarded by this Commission as the best indicator of the return investors require in the marketplace for investment-grade regulated utility companies. Mr. Parcell relied on the results of both his DCF and CE analyses to determine his ROE recommendation and did not include the results of his CAPM analysis, as he found that the resulting range (i.e., 6.3% to 6.6%) was too low to be practical (R.

p. 801-45, ll. 18-21). Mr. Parcell thus further established the reasonableness of his recommended ROE. By excluding his CAPM analysis, Mr. Parcell evidenced an effort to produce a fair and reasonable recommendation to the Commission. Conversely, DEP witness Hevert recommended that both of his DCF analyses be given little weight by the Commission, apparently in large part due to them yielding results which he believed to be too low, and thus disadvantageous to the Company (R. p. 948-8, ll. 1-3).

The Commission also relied on Mr. Parcell's testimony which demonstrated that Mr. Hevert's analyses showed a consistent pattern of choosing data and methodologies that result in the highest possible Cost of Equity conclusions. As the Commission correctly pointed out in questioning the testimony of Mr. Hevert, the data used by Mr. Hevert was filtered to produce an inflated ROE recommendation to the benefit of the Company. The Commission additionally accepted Mr. Parcell's assertion that Mr. Hevert's use of several "factors" to create an impression of more risk for DEP are already considered by the rating agencies and essentially resulted in Mr. Hevert "double-counting" risk in order to artificially inflate his ROE recommendation (R. p. 801-57, ll. 1-21, p. 801-58, ll. 1-2). The Commission thus provided significant justification for its refusal to accept Mr. Hevert's recommendation in this case.

Mr. Parcell's ROE recommendation was further supported by his testimony evidencing ROEs authorized by other regulatory bodies across the country. The Commission relied on evidence presented by Mr. Parcell that, from 2017 to 2018, ROEs allowed by regulatory jurisdictions across the United States for all electric utilities averaged 9.59% with a median ROE of 9.58% (Exhibit DCP-2, Schedule 3). This national average is only 9 basis points higher than that awarded by the Commission, but it is 116 basis points lower than Mr. Hevert's recommended 10.75% ROE.

Testimony and evidence submitted to the Commission in this proceeding, primarily through Mr. Chriss and Mr. Parcell, confirms a decline in ROEs across the country in recent years, supports the strength of market conditions, and indicates an anticipated upward trend in interest rates in the near term. These factors, along with the financial stability of DEP, strongly support the slight reduction in the national average ROE awarded by the Commission in this case. The Commission has substantial support in the record to support its discounting Mr. Hevert's ROE recommendation as biased in the Company's favor. Both Mr. Parcell's factual testimony regarding a 9.58% national average and the Commission's legitimate rejection of Mr. Hevert's biased recommendation establish that there was substantial evidence in the record to support the Commission's assignment of a 9.5% ROE.

4. Coal Ash Litigation Expenses

The Commission considered the substantial evidence on the whole record presented by the parties and determined that the Company failed to carry its burden of persuasion that its coal ash litigation expenses were reasonably recoverable.

The Company is correct when it asserted that it is "entitled to a presumption that its expenditures were reasonable and incurred in good faith[.] Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 109-10, 708 S.E.2d 755, 762-63 (2011). (See Pet. p. 14.) However, "the presumption in a utility's favor clearly does not foreclose scrutiny and a challenge. In those circumstances, the burden remains on the utility to demonstrate the reasonableness of its costs." Utils. Servs., 392 S.C. at 109-10, 708 S.E.2d at 762-63 (citing Hamm v. S.C. Pub. Serv. Comm'n, 309 S.C. 282, 286-287, 422 S.E.2d 110, 112-113 (1992)). Moreover, the burden of proof in showing the reasonableness of a utility's costs ultimately rests with the utility. Hamm, 309 S.C. 282, 422 S.E.2d 110. In the presence of "evidence that overcomes the presumption of

reasonableness, a utility must further substantiate its claimed expenditures." Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 110, 708 S.E.2d 755, 762–63 (2011). The Commission may rely on "any [] relevant evidence to determine that the presumption of reasonableness [has] been overcome as to a particular expense." Utilities Servs., 392 S.C. at 112, 708 S.E.2d at 764 (internal punctuation altered).

Ultimately, the Commission's conclusion that the burden has been overcome must rest upon "substantial evidence," which means "relevant evidence that, considering the record as a whole, a reasonable mind would accept to support [the Commission's] action." Utilities Servs., 392 S.C. at 103, 708 S.E.2d at 759 (quoting Porter, 333 S.C. at 20, 507 S.E.2dat 332).

The presumption of reasonableness "does not shift the burden of persuasion but shifts the burden of production on to the . . . contesting party to demonstrate a tenable basis for raising the specter of imprudence." Id. "Burden of production refers to a party's responsibility to introduce sufficient evidence on a contested issue to have that issue decided by the fact-finder, rather than decided against the party in a preemptory decision. Smith v. Barr, 650 S.E.2d 486 (S.C. Ct. App. 2007).

"The Commission sits as the trier of facts, akin to a jury of experts," Hamm v. SC PSC, 309 S.C. 282, 287, 422 S.E.2d 110, 113 (1992) (citing SC Tel. & Tel. Co. v. SC PSC, 270 S.C. 590, at 597, 244 S.E.2d 278, at 282 (1978), and is the ultimate fact-finder in a ratemaking application." Utilities Servs., 392 S.C. 96, 106, 708 S.E.2d 755, 761. "It has the power to independently determine whether an applicant has met its burden of proof." Utilities Servs., 392 S.C. at 106, 708 S.E.2d at 761.

The Commission properly determined that, subsequent to a reasonable challenge, the Company failed to produce "specific information" that showed "the benefit to customers" of these

expenses or that otherwise established the Company's entitlement to recovery. (Order at 63.) The Company failed to meet its burden of persuasion. (See id. at 63-64.) The Company's argument in its Petition is squarely premised on the assertion that "[t]he record in this docket does not provide a basis for overcoming the presumption that the Company's coal ash litigation expenses were reasonable and incurred in good faith." This assertion is incorrect.

Based on the substantial evidence on the whole record, the Commission properly excluded from recovery the litigation expenses detailed in Adjustment #36. While the initial expenses for which the Company sought recovery—in essence naked numbers—may have been entitled to the presumption of reasonableness, once these expenditures were reasonably challenged—i.e. the testimony filed by ORS in which it recommended the Company not be entitled to recovery of coal ash litigation expenses[6]—the Company failed to provide meaningful justification for these expenses. ORS witness Hamm testified that the Company failed to provide the Commission with "specific and understandable information demonstrating that all expenses should be paid for by DEP customers in the first place." (Tr. p. 1309, ll. 3-6). This Commission has previously held, "[i]t is the responsibility of the regulated utility—not the Commission, ORS, or any other party—to support the operating expenses that contribute the utility's revenue requirement." (Commission Order No. 2018-68, p. 39 (under appeal)). This Commission cannot presume that the expenses a utility seeks to recover in its rates and charges are legitimate if they cannot be subjected to the scrutiny of an audit or examination. The ORS Audit department sent multiple requests to the Company seeking additional verification and explanation of these expenses. Ex. 67; Tr. p. 1310-7. Every rate received by an electric utility must be just and reasonable. S.C. Code Ann. § 58-27-

[6] See Tr. p. 1383, in which ORS witness Hamm testified, "[W]e [ORS] got a cover sheet [of legal expenses]. We didn't get any information as to the services rendered . . . behind the numbers."

810. Absent additional information the Commission correctly concluded it would be unreasonable to pass these coal ash litigation expenses on to the Company's customers.

Furthermore, these expenses were incurred as a result of litigation that only came about due to the Company's handling of coal ash. The amount of the coal ash litigation expenditures are substantial. Based on the nature of these litigation expenses, the magnitude of these expenditures raises additional concerns about whether the Company would have incurred these expenses in the absence of imprudence.

Sound regulatory policy further supports the view of the evidence that the Company's failure to provide the requested information to review the prudency of its coal ash litigation expenses rebuts the presumption of reasonableness. See generally Patton v. SC PSC, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984) (citing So. Bell Tel. and Tel. Co. v. SC PSC., 270 S.C. 590, 244 S.E.2d 278 (1978) (Commission is "the 'expert' designated by the legislature to make policy determinations regarding utility rates"). "[T]he PSC is entitled to create incentives for utilities to improve their business practices." Utilities Servs., 392 S.C. at 105, 708 S.E.2d at 760 (2011) (citing Patton, 280 S.C. at 292, 312 S.E.2d at 259–60; So. Bell Telephone, 270 S.C. at 599, 244 S.E.2d at 283 (finding it was not improper for the PSC to consider whether a utility could undertake measures to cut costs and improve efficiency)). The Company's business practices include any and all actions and inactions that led it into its myriad of coal ash-related legal battles. Making the Company bear these expenses incentivizes it to try to avoid a similar situation in the future. Disallowance encourages communication regarding the nature and origins of its legal expenses and promotes the resolution of unclarity.

After the presumption of reasonableness was rebutted, the Commission correctly concluded that the Company failed to carry the burden of persuasion. The rules applicable to this

issue are clear. The Commission, in properly considering all evidence on the whole record, determined that the presumption to which the Company was entitled had been rebutted and the Company failed to carry its burden of persuasion. As a result, the Commission properly denied recovery of the coal ash litigation costs.

5. **CertainTEED Litigation Costs**

With respect to the Commission's decision to disallow the costs related to the CertaintTEED Gypsum, Inc. litigation, the Company asserts that "the Commission erroneously focuses its analysis on a judicial proceeding that addressed exclusively *whether* the Company had breached a contract to supply gypsum, not on the prudency of the Company's actions throughout the entire timeline in question." (Pet. at 14 (emphasis in original).) Contrary to the Company's narrow portrayal of the the Commission's Order and the evidence of record, the Order is properly supported by the substantial evidence on the whole record.

The judicial proceeding at issue between CertainTEED and the Company argued before the North Carolina Business Court, did revolve around the issue of breach of contract, but the court's opinion also provides the backdrop out of which the Company's imprudence arises. (*See* Ex. 68, WJM-2.) Review of DEP's prior conduct demonstrates that DEP management failed to maintain actual compliance with the terms a major contract, resulting in a major breach of contract ruling and settlement payments of $90 million—money customers would otherwise have benefited from. (*See*, *e.g.*, Tr. pp. 925, 1306, 1310-10, 1347.) The Company then requested to charge *its customers* for that loss and to have them pick up the tab on legal fees. (*E.g.* Tr. pp. 920, 922.) The Company belabors the fact of the

net benefit to customers of its relationship with CertainTEED while ignoring the fact that that benefit would be much larger if the Company had not acted imprudently.[7]

DEP has a continuing operating and regulatory obligation to meet its contract obligations and it failed to meet that basic regulatory standard. The record clearly supports the conclusion that the Company failed to meet the terms of its contract, did not renegotiate the terms, and picked a losing fight with CertainTEED when CertainTEED itself evidenced a preference for cooperation over litigation. (*See* Ex. 68, WJM-2.) The Company failed to provide additional context about why its decisions that resulted in a loss of $90 million made sense. Instead, the Company chose to rely chiefly on the presumption of reasonableness for recovery. (*See* Pet. pp. 14-15.) There is ample basis in the record to conclude the presumption has been rebutted.

The Company did not offer any meaningful secondary arguments, evidence or analysis to explain why its conduct with respect to the CertainTEED litigation was reasonable. Where the Company does not rely on the presumption of reasonableness in its Petition, it mischaracterizes the Commission's findings, (*see* Pet. 15 ("the Commission's finding that customers did not benefit from . . . the entirety of this arrangement")), and passingly mentions fairness, determinations regarding which lie squarely within the Commission's prerogative as finder of fact and regulatory policy expert. See Hamm, 309 S.C. at 287, 422 S.E.2d at 113; Patton, 280 S.C. at 291, 312 S.E.2d at 259. The Company does hint that its "decision to defend itself and to enter into the settlement was a strategic, reasonable, and prudent decision," but there ends the analysis. (*See* Pet. 15.) Once the

[7] A good example of this is Company witness Coppola's avoiding Commissioner Hamilton's question about whether it "would've been more beneficial to the customers, to complete the contract or go into litigation?" (*See* Tr. pp. 921-22.)

presumption was rebutted, the Company had the burden of persuading the Commission that its breach was reasonable, and the costs incurred should be passed to its customers.

To allow the Company to recover the costs from customers of failing to manage a major contractual relationship creates "no incentive to minimize costs". Hamm v. PSC and CP&L, 291 S.C. 1190, 352 S.E.2d 476 (1987). The Commission, as the trier of fact, properly considered the substantial evidence on the whole record and determined the Company failed to carry its burden.

Conclusion

For the aforementioned reasons, ORS respectfully requests that DEP's Petition for Rehearing or Reconsideration be denied.

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